ing and misbranding of wine that exceeded the requirements of federal law. *Id.* 31a, 35a-36a.

By contrast, until the Nineteen Thirties, there was relatively limited federal activity on the subject of wine labeling and misbranding. The federal role focused primarily on taxation and was not significant compared to that of the States. No enforceable federal regulations existed regarding wine and no federal agency had the authority to regulate alcoholic beverage labeling.[1] *Id.* 22a-29a, 35a.

Congress's Intent To Supplement, Not Supplant, State Regulation of Wine Labeling, and BATF's Understanding that States Could Impose More Stringent Standards

Congress entered the field of wine label regulation only in the Nineteen Thirties, most importantly by enacting the Federal Alcohol Administration Act ("FAA Act"), Pub. L. No. 74-401, 49 Stat. 977 (1935) (codified as amended 27 U.S.C. §§ 201-211). The FAA Act bars misleading statements on wine labels and requires wine producers to obtain for each label a certificate of label approval, or "COLA," evidencing its compliance with federal standards. The Bureau of Alcohol, Tobacco and Firearms ("BATF")—the office within the U.S. Department of Treasury formerly charged with enforcing the FAA Act[2]—has enacted a series of regulations regarding wine labeling through notice-and-comment rulemaking. However, neither Congress, through

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[1] Certain "food standards" adopted by the U.S. Secretary of Agriculture in 1904, which included wine standards, were merely advisory and not legally binding, and a "Food Inspection Decision" issued by three federal department secretaries in 1910 actually deferred to and acquiesced in the applicable State wine statute. App. 24a-26a.

[2] Under the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(d), 116 Stat. 2135, 2275 (2002), BATF's functions under the FAA Act are now performed by the Alcohol and Tobacco Tax and Trade Bureau. *See also* 68 Fed. Reg. 3744 (Jan. 24, 2003). For consistency, both will be referred to as BATF.

the FAA Act, nor BATF, through its regulations, has expressed any intent to supersede the States' concurrent or more stringent regulation of wine under their traditional police powers.

Nothing in the language or legislative history of the FAA Act reveals a congressional intent to preempt State wine regulations. Representative Cullen of New York, the author of the Act, remarked in the floor debates that its purpose was "to supplement legislation by the States to carry out their own policies" because the States "alone cannot do the whole job." 79 Cong. Rec. 11,714 (July 27, 1935) (statement of Rep. Cullen); *accord* H.R. Rep. No. 74-1542, at 2-3 (1935). At the same time he added that "[n]o power is taken away from the States to provide such safeguards as they deem best for their own protection." 79 Cong. Rec. 11,714 (statement of Rep. Cullen).

By December 1934, California also had specific and detailed wine regulations restricting the use of place names on wine labels. After passage of the FAA Act in 1935, California's requirements continued to exceed federal requirements. The first regulations under the FAA Act became effective in 1936. *See* 1 Fed. Reg. 83 (Apr. 1, 1936). As amended in 1938, they stated that a wine is entitled to be described with an "appellation of origin" (the geographic source of the grapes) if "at least 75 percent of the wine is derived from fruit . . . grown in the appellation area indicated" and "it conforms to the [State and local] laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such state." 3 Fed. Reg. 2093 (Aug. 26, 1938) (codified at 27 C.F.R. §§ 4.25(b)(1)(i), (iii)). Soon thereafter, California enacted a statute strengthening certain wine labeling requirements. *See* Act of July 22, 1939, ch. 1033, §§ 1-4, 1939 Cal. Stat. 2838 (codified at Cal. Bus. & Prof. Code §§ 25236-25238). It also promulgated regulations imposing a 100 percent grape-origin requirement for any wine labeled as "'California' or any

geographical subdivision thereof." App. 45a-46a. In these and other instances, the California Legislature authorized State wine regulations that were stricter than federal wine regulations. App. 46a.

The federal government consistently has recognized the States' authority to impose different or stricter standards for wine labeling. In 1978, BATF adopted rules concerning appellations of origin for a new subcategory known as "viticultural areas," *see* 43 Fed. Reg. 37,672, 37,674, 37,678 (Aug. 23, 1978), which are "grape growing region[s] distinguishable by geographic features, the boundaries of which have been recognized and defined" by BATF, *see* 27 C.F.R. § 4.25(e)(1)(i). Under these regulations, a "viticultural area" could be mentioned on a wine label only if at least 85 percent of the grapes used to make the wine were grown in that viticultural area. *Id.* The 1978 federal regulations expressly recognized State authority, however, by making the right to place a "viticultural area" designation on a wine label also contingent on compliance with "*the laws and regulations of all the states contained in the viticultural area.*" 27 C.F.R. § 4.25a(e)(3)(iv) (1978-1981); *Id.* § 4.25a(e)(3)(v) (1981-1986) (emphasis added).

The 1978 federal regulation, for example, left in place an Oregon geographic brand name that was stricter than the federal rule. The Oregon rule provided that the names of Oregon counties or wine-producing regions could not be used in a brand name "unless 100 percent of the grapes used to produce that wine were grown within the boundaries of that appellation of origin." *See* Or. Admin. R. 845-10-292(6)(c)(2) (1977) (currently codified at Or. Admin. R. 845-010-0920(2)). Since Oregon's adoption of the regulation in 1977, BATF has expressed no hostility to Oregon's stricter rule, which remains in force today. In 1986, in the course of repealing former 27 C.F.R. § 4.25a(e)(3)(v) concerning compliance with State regulations, BATF repeatedly acknowledged the existence and enforceability of Oregon's "more

stringent" wine labeling regulations. BATF observed that "regulations of Oregon and Washington differ greatly regarding the production *and labeling* of wine. Oregon regulations are more stringent than Federal regulations." 51 Fed. Reg. 3773, 3774 (Jan. 30, 1986) (emphasis added).

BATF repealed former § 4.25a(e)(3)(v) because it was too burdensome for the federal government to enforce all of the States' laws and regulations. BATF observed:

> A Federal requirement for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce due to the multitude of state and local laws and regulations . . . . State laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved.

51 Fed. Reg. 3773. Underscoring the point, BATF stated, "[t]he State laws and regulations remain in effect and continue to be enforced by the agencies of the states involved in winemaking." *Id.* BATF thus made clear that States may impose more stringent labeling rules.[3]

The Federal "Grandfather Clause" in BATF's 1986 Regulation

In July 1986, six months after BATF affirmed that State laws and regulations are enforced by the State involved,

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[3] Where Congress and BATF have desired to preempt State labeling regulations on alcoholic beverages, they have done so expressly. In 1988, Congress amended the FAA Act to require that wine and other alcoholic beverages carry a health warning on the back label. Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, § 8001(a)(3), 102 Stat. 4518 (1988) (codified at 27 U.S.C. §§ 213-219a). Congress expressly provided for federal preemption of such health warnings on alcoholic beverage labels. 27 U.S.C. § 213. BATF adopted implementing regulations that expressly reaffirmed the preemptive effect of that regulation. *See* 27 C.F.R. § 16.32. In contrast, neither Congress nor BATF has ever indicated an intent to preempt State wine labeling laws such as § 25241.

BATF adopted revised regulations regarding geographic brand names. BATF explicitly determined that consumers believe that a geographic brand name on a wine label indicates the source of the grapes. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986) ("In the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes are grown."). It further found that the inclusion of an accurate appellation of origin on the front label was insufficient to dispel the misimpression created by a misleading geographic brand name. *Id.* The 1986 federal regulation avoids such consumer confusion by prohibiting the use of a label bearing a geographic brand name unless the wine meets the appellation of origin requirements for the geographic area named. *See* 27 C.F.R. § 4.39(i)(1); *see also id.* § 4.25(b)(1)(i).

A "grandfather clause" appended to the federal regulation, however, does not apply these more stringent labeling standards if the labels were in use prior to July 7, 1986, so long as an accurate appellation of origin is also included. *Id.* § 4.39(i)(2)(ii). BATF made no finding that geographically misdescriptive brand names in use prior to July 7, 1986 were any less misleading than those that came into use on or after that date and gave no reason for promulgating a lower standard for such brands. Moreover, BATF did not consider or take into account local conditions affecting the use of specific geographic brand names or the misuse of Napa brand names in particular. The language that Petitioners quote from the *Federal Register* notice to suggest that BATF viewed the "grandfather clause" as still protecting consumers (Pet. 4) (italicized words) actually refers broadly to the entire "final rule" and not specifically to BATF's (unexplained) creation of a "grandfather clause."[4]

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[4] Petitioners' assertion that BATF set a lower standard for "existing geographic brand names" because it believed that consumers "understood that the brand names did not identify the wine's origin" (Pet. 4) is wholly

BATF continues to acknowledge the States' concurrent authority to regulate wine labeling, including through stricter regulations than BATF has imposed. In 1993, BATF specifically approved a California regulation requiring that 100% of the grapes in wine with a "California" appellation be grown in the State, even though federal regulations expressly permit a State appellation of origin where only 75% of the grapes are grown there. *See* 58 Fed. Reg. 65,295 (Dec. 14, 1993).

BATF-Issued COLAs Show Only Compliance with Federal Regulations

BATF prohibits bottling or distribution of wine in interstate commerce unless BATF has issued a COLA for the wine. A COLA, by BATF's own proclamation, indicates only compliance with specific federal laws and regulation. BATF's COLA form (TTB F5100.31 (2-2003)) reads in pertinent part: "We collect this information to verify your compliance with the *Federal* laws and regulations we administer for the labeling of alcoholic beverages" (emphasis added).

In its Final Rule concerning revocation of COLAs, BATF reiterated this point.

> The certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder. On the contrary, Paragraph 1 of Form 5100.31 provides that "This certificate is issued for ATF use only . . . ." The certificate of label approval is a statutorily mandated tool used to help ATF in its enforcement of the labeling requirements *of the FAA Act*.

64 Fed. Reg. 2122, 2123 (Jan. 13, 1999) (emphasis added); *see also Boller Beverages, Inc. v. Davis*, 183 A.2d 64, 69 (N.J. 1962) ("[A COLA] goes no further than evidencing

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specious and not supported by BATF's rulemaking notice. To the contrary, BATF specifically found that geographic brand names *did* indicate the wine's origin and that the use of an accurate appellation of origin was insufficient to correct the misimpression created by geographically misdescriptive brand names. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986).

compliance with [federal regulatory] standards imposed only for the purposes mentioned in the valid exercise of federal authority.").

BATF's labeling staff does not make any individualized determination that "grandfathered" brand names are not misleading before issuing COLAs. It merely confirms that the use of "grandfathered" brands complies with the grandfather clause. App. 70a; 27 C.F.R. § 4.39(i). The record contains no evidence that BATF specifically concluded that Bronco's misdescriptive "Napa" labels do not mislead consumers. The issuance of such COLAs therefore is not an indication that States cannot impose more stringent labeling requirements.

B. Bronco's Misleading Use of Napa Brand Names.

For well over a century, Napa County has been known for producing the finest and most prestigious wines in the United States. Its reputation is attributable in large part to the distinctiveness and uniformly high quality of the grapes grown there. Petitioners make wines from grapes grown *not* in Napa County but in other areas where the cost of grapes and their quality are considerably lower. Bronco then sells its wines under Napa brand names—Napa Ridge, Napa Creek and Rutherford Vintners[5]—that mislead consumers into believing that the wine is made from the higher-quality and higher-priced grapes grown in Napa County.[6]

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[5] Bronco has attempted to exploit the "grandfather clause" and create an unanticipated market in non-Napa wines using Napa brand names. Bronco purchased the Napa Creek brand in 1993 and the Rutherford Vintners brand in 1994. App. 3a. All of the wines marketed by the prior owner under the Napa Creek brand and most wines marketed by the prior owner under the Rutherford Vintners brand had been made from Napa County grapes. *Id.* at 3a-4a.

[6] Bronco has a history of misdescribing its wine to consumers. *See Bronco Wine Co. v. U.S. Dep't of Treasury*, 997 F. Supp. 1309, 1317 (E.D. Cal. 1996) (upholding federal regulators' action prohibiting Bronco from wrongly using its Rutherford Vineyards brand name for wine not made from grapes grown in Rutherford). Moreover, Bronco pleaded *nolo*

Bronco prominently features its Napa brand names on the front labels of its wines, followed at the bottom of the label and in smaller lettering by the appellation of origin. Representative front labels of Bronco's wines are included in the California Court of Appeal's December 18, 2002 decision. App. 134a. The back label of each states that the wine was "vinted and bottled" in "Napa, CA" or in "Napa, California." In addition, many of the Napa Ridge wines include the word "Napa" on the bottleneck collar label, and some include that word on branded corks.

In furtherance of its long-established role in regulating wine produced within the State, and in the face of Bronco's practice of purchasing "grandfathered" Napa brand names to produce and market wines made from non-Napa grapes, the California Legislature in 2000 addressed the problem of the misleading use of Napa brand names by enacting § 25241 of the California Business and Professions Code.[7] The Legislature held hearings and received substantial public comment which revealed that consumers were misled by wines that bore Napa brand names but were made from non-Napa grapes.[8] App. 4a, 85a-86a. The testimony and public com-

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contendere, and its owner, Fred Franzia, pleaded guilty to federal fraud charges for deceptively passing off less expensive grapes as Zinfandel grapes from 1987 to 1992. Bronco and Franzia were fined heavily, and Franzia was banned for five years from sitting on Bronco's board of directors or from holding a position with responsibility for compliance with federal wine regulations. NVVA App. 358-400, filed Feb. 28, 2001, Cal. Ct. App., in present case.

[7] In addition to Bronco's Napa brand names, there are 32 other Napa-related "grandfathered" brands that could be used to deceive consumers into buying Napa-branded wines not made from Napa grapes. NVVA App. 227-28, filed Feb. 28, 2001, Cal. Ct. App., in present case.

[8] The Legislature also received evidence of Bronco's future intent or willingness to sell its geographically misdescriptive Napa brands on a far greater scale, as indicated by its completion of a facility in the City of Napa, Napa County, that is capable of producing approximately 18

ment were not just from Napa Valley vintners and growers, but also from consumers, retailers, and others. *Id.* at 86a n.10. In addition to this evidence, the Legislature considered a survey indicating that Napa brand names for wine made from non-Napa grapes are deceptive and confusing to consumers.[9] Based on the evidence, the Legislature found that "certain producers are using Napa appellations on labels . . . for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices." Cal. Bus. & Prof. Code § 25241(a)(2). Concluding that legislation was necessary to eliminate these misleading practices, the Legislature declared its "intent . . . to assure consumers that the wines produced or sold in the state with brand names . . . referring to Napa appellations in fact qualify for the Napa County appellation of origin." *Id.* § 25241(a)(3).

In furtherance of that objective, § 25241(b) provides that no wine produced or marketed in California shall use a brand name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless the wine qualifies for, and includes, the appellation Napa County or the appellation of a viticultural area located entirely within Napa County. Pursuant to federal regulations, a wine does not qualify for a county appellation of origin unless at least 75 percent of the grapes are from that county, 27 C.F.R. § 4.25(b)(1), and does not qualify for a viticultural

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million 12-bottle cases a year—output that would be more than double the current annual production of all Napa-grown wines. App. 4a n.4.

[9] The survey showed that 99 percent of those interviewed thought a wine with the brand name "Napa Valley Caves" was from Napa Valley; 81 percent believed it was confusing if the brand name included the word "Napa" but the wine was not sourced with Napa grapes; 91 percent felt it was deceptive to use a brand name based on geographic region known for wine when the wine was made with grapes from another region; and 82 percent indicated the brand name is important when purchasing wine. App. 88a n.17.

area appellation of origin unless at least 85 percent of the grapes are from that area, *id.* § 4.25(e)(3)(ii).

Section 25241 therefore prohibits wine producers like Bronco from misleading consumers by selling wine made from non-Napa grapes under Napa brand names. It does not, however, prohibit anyone from using Napa brand names to sell wine made from Napa grapes. Nor does it prohibit anyone from using non-Napa grapes to sell wine under any non-Napa brand name.

C. Bronco's Unsuccessful State Court Action and the California Supreme Court's Unanimous Decision.

Bronco filed an original petition for a writ of mandate in the California Court of Appeal seeking to prohibit the California Department of Alcohol Beverage Control (the "Department") and its director from enforcing § 25241 with respect to Bronco's wines on the ground that the statute violated the First Amendment, Supremacy Clause, Commerce Clause, and Takings Clause of the United States Constitution. Intervenor Napa Valley Vintners Association ("NVVA") joined with the Department in defending the validity of the statute. The Court of Appeal held that § 25241 is preempted by federal law but did not reach the other federal law issues.

The California Supreme Court granted review and, addressing only the preemption issue, unanimously reversed the judgment of the Court of Appeal. Speaking for the court, Chief Justice George rejected every aspect of Petitioners' preemption argument. The California Supreme Court concluded that protection of consumers against misleading brand names and labels was a subject that traditionally had been regulated by the States and that it was therefore appropriate to apply the presumption against preemption. App. 14a. It held that § 25241 was not preempted because the objective of the FAA Act and BATF's federal regulations was to supplement, not supplant, State regulation and BATF had long operated on

the understanding that States may and would continue to impose their own stricter wine labeling regulations. *Id.* 64a-67a.

The California Supreme Court also rejected Bronco's claim that a federal COLA is the equivalent of a federal right, license, or permit to market wine in interstate commerce. *Id.* 67a-70a. It noted that neither Congress nor BATF has ever so implied, and that, to the contrary, a COLA signifies nothing more than compliance with federal labeling law and does not exempt the COLA holder from State laws. *Id.* 70a. The Court therefore remanded the case to the Court of Appeal to consider Bronco's remaining federal claims.

Petitioners thereafter filed a petition for certiorari with this Court, seeking review of the California Supreme Court's unanimous preemption holding and raising the same arguments presented in the instant petition. Respondents opposed the petition, arguing that the California Supreme Court's decision was correct and that the decision was not final under 28 U.S.C. § 1257. This Court denied the petition. *See* 125 S. Ct. 1646 (Mar. 21, 2005).

California Court of Appeal's Decision on Remand

On remand, the California Court of Appeal unanimously upheld the constitutionality of § 25241. The Court of Appeal found that § 25241 does not violate the First Amendment because the statute is "a regulation of deceptive and misleading commercial speech that is not entitled to First Amendment protection." App. 80a; *id.* 81a-96a. The Court of Appeal also rejected Petitioners' claims under the Commerce and Takings Clauses of the Constitution.

Petitioners then filed a petition for review in the California Supreme Court, contending that the Court of Appeal erred in concluding that § 25241 did not violate the First Amendment or the Commerce Clause. The California Supreme Court denied the petition. App. 172a.

REASONS FOR DENYING THE WRIT

I. The California Supreme Court's Holding that Federal Law Does Not Preempt § 25241 Raises No Issue Meriting This Court's Review.

The California Supreme Court's decision presents a straightforward application of well-settled principles of preemption law. Petitioners do not contest (i) that the FAA Act and regulations do not expressly preempt State wine labeling laws; (ii) that the FAA Act and regulations do not "occupy the field" of wine labeling regulation; and (iii) that compliance with both federal law and § 25241 is possible. *See* Pet. 11. They argue instead that § 25241 is preempted because it allegedly frustrates the objectives of BATF's so-called "grandfather clause," 27 C.F.R. § 4.39(i)(2), and the COLAs issued to Petitioners under that regulation. Pet. 11-16. Petitioners also argue that the California Supreme Court erred in applying a presumption against preemption, Pet. 16-23, even though wine labeling is a field traditionally occupied by the States.

A. Neither BATF's "Grandfather Clause" Nor Any COLA Preempts Stricter State Regulation of Misleading Wine Labels.

In rejecting Petitioners' arguments, the California Supreme Court applied the standard this Court consistently applies in such cases. App. 9a-10a. It asked whether "under the circumstances of this particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941),[10] and concluded it did

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[10] *Accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

not. Petitioners' contention that the court's conclusion is incorrect, Pet. 11, is not an adequate basis for granting certiorari. *See* U.S. Sup. Ct. R. 10; *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

In any event, the California Supreme Court correctly decided the preemption issue. It is beyond dispute that the overriding purpose of the FAA Act and the BATF regulations is to prevent consumer deception in labeling of alcoholic beverages. App. 64a-65a. Section 25241 furthers that very objective. The California Legislature found that labels like those of Petitioners, whose Napa brand names belie their non-Napa contents, mislead consumers and therefore enacted § 25241 to ban their use on wines produced in the State. App. 4a. The California Supreme Court thus correctly concluded that the federal statute and regulations and the California statute serve harmonious purposes. App. 65a.

1. ***The federal "grandfather clause" does not preempt § 25241.***

Contrary to Petitioners' suggestion, BATF's "grandfather clause" cannot fairly be construed as a federal authorization to employ labels that confuse and deceive consumers regarding the contents of the wine—in essence, a license to mislead—and to do so free from State interference or regulation. Such a construction cannot possibly be reconciled with the overriding federal policy of the FAA Act: to prevent wine producers from misleading consumers. In promulgating its 1986 labeling regulation, BATF expressly found that geographic brand names necessarily convey to consumers the source of the grapes used to make the wine and thus the inclusion of a correct appellation of origin on the label does not dispel the confusion created by a geographically misdescriptive brand name. 51 Fed. Reg. 20,480, 20,481 (June 5, 1986). There is simply no indication that BATF intended to prevent States from banning the use of geographically misdescriptive

labels that mislead consumers regarding the source of the grapes used to make the wines.

BATF's 1986 regulation merely sets minimum federal standards for use of geographic brand names on wine labels. Brands in use after July 7, 1986 are subject to one standard (§ 4.39(i)(1)); brands in use prior to that date are subject to a less stringent standard (§ 4.39(i)(2)). But in setting these federal minima, the regulators nowhere indicated an intent to preclude stricter State standards—whether for grandfathered or non-grandfathered brands. *See supra* pp. 5-6, 8. To the contrary, as the California Supreme Court observed, "BATF long has been aware of these stricter state law brand-name labeling regulations, and, far from suggesting that their enforcement would frustrate any federal purpose, . . . BATF has stated its understanding that such labeling regulation will be enforced by the states." App. 65a-66a (footnote omitted). When amending its labeling regulations only a few months before the "grandfather clause" was put into effect, BATF recognized, "State laws and regulations of the state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved." 51 Fed. Reg. 3773, 3774 (Jan. 30, 1986).

As the California Supreme Court unanimously found, the record is entirely devoid of evidence supporting Petitioners' contention that the BATF regulation was intended to preempt State regulations. "We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general* matter its grandfather clause was appropriate so as to avoid destroying an 'entire class' of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a.

A federal law establishing certain minimum standards does not imply that States are precluded from applying more stringent standards when the federal government has not occupied the field or otherwise indicated an intent to preempt. *See Hillsborough County*, 471 U.S. at 721 (more stringent local ordinance related to health and safety not preempted by federal regulations when federal regulators expressed intent not to displace state law); *see also Sprietsma*, 537 U.S. at 67 (though federal decision not to regulate was "intentional and carefully considered," it failed to convey an authoritative message of federal policy preventing States from regulating).

More specifically, by excluding certain behavior from a more general prohibition—as BATF did here when it imposed lower minimum standards on "grandfathered" brand names—the federal government does not thereby preclude stricter state regulation of that behavior. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 132 (1978) ("[I]t is illogical to infer that by excluding certain . . . behavior from [a] general ban . . . , Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion."); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 498 (9th Cir. 1984) ("A finding of preemption is particularly inappropriate when the state is regulating conduct permitted by federal regulation, but only as an exception to a broad federal prohibition."), *quoted in Malabed v. N. Slope Borough*, 335 F.3d 864, 872 (9th Cir. 2003); *cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996) (federal grandfather provisions not intended to displace status quo allowing State-law negligence claims).

The cases relied on by Petitioners are readily distinguishable because each involved a clear federal policy to preclude State interference with a federal program or instrumentality. In *Crosby*, for example, the Court found that Congress did not intend to delegate to the States any aspect of its carefully calibrated policy regarding relationships with Burma. 530 U.S. at 377-78. In *Geier*, the Court discerned a federal policy

of fostering experimentation and innovation in the development of passive restraint devices without interference by the States. 529 U.S. at 880-81. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), a federal statute expressly empowered national banks to sell insurance. *Cf. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (holding that a federal regulation stating "that a federal savings and loan 'continues to have the power' to include a due-on-sale clause in a loan instrument and to enforce that clause 'at its option'" preempted a state prohibition on due-on-sale clauses).[11] None of these decisions dictates, or even supports, federal preemption of State regulation of wine labeling.

2. *Federal COLAs do not preempt § 25241.*

Petitioners additionally claim that California's § 25241 is unlawful because it "impair[s] the exercise of a license or permit issued under a federal regulatory scheme"—to wit, a COLA. Pet. 12. Petitioners' argument—which would invalidate *every* State labeling law that exceeds federal requirements—fundamentally misapprehends the nature and purpose of COLAs issued by BATF.

As the California Supreme Court noted, "nowhere in the separate COLA procedures set forth in [the FAA Act], or the extensive COLA regulations, does Congress or the BATF even *imply* that a COLA constitutes a license or permit. Quite the contrary." App. 69a (citations omitted). BATF has explained that a COLA "was never intended to convey any type of proprietary interest to [its] holder." 64 Fed. Reg. 2122, 2123 (Jan. 13, 1999). It "is issued for [B]ATF use only." *Id.* Consistent with the dual scheme of regulation, BATF's COLA application form specifies that the informa-

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[11] Another case relied on by Petitioners, *McDermott v. Wisconsin*, 228 U.S. 115, 133-34 (1913), invalidated a State labeling law that required physical removal of labels meeting federal specifications, thereby frustrating federal officials' ability to ensure compliance with federal law.

tion can be shared with State regulators "to aid in the performance of their duties." App. 69a (citation omitted). A COLA therefore demonstrates only that a particular wine label satisfies the federal government's minimum requirements; it does not exempt the label from additional State regulation.

This Court repeatedly has recognized that States may impose additional regulations even after an entity has obtained a certificate of compliance with federal regulations. *See, e.g.*, *Medtronic*, 518 U.S. 470; *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987); *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983). That is all that has happened here—California has imposed a stricter labeling requirement than federal law mandates, and producers now must comply with both.

B. The California Supreme Court's Application of the Presumption Against Preemption Is Consistent with Decisions of This Court and the Federal Courts of Appeals.

Petitioners pose the question "whether the presumption against preemption ever applies in conflict preemption cases and whether, if it does, evidence of preemptive intent on the part of Congress or a federal agency is necessary to avoid or overcome the presumption." Pet. 20-21. As an initial matter, as shown above, even without applying the presumption, there is no preemption in this case because § 25241 does not stand as an obstacle to federal purposes. *See supra* Part I.A. Because the California Supreme Court came to the same conclusion, App. 64a-66a, its decision did not turn on application of the presumption. Thus, this is not an appropriate case for reviewing the presumption's application. *See, e.g.*, *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (declining to review a state-court judgment because "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than

an advisory opinion"). In all events, the California Supreme Court properly applied the presumption against preemption.

1. *The Presumption Applies Where, as Here, the State Has Traditionally Occupied the Field To Be Regulated.*

For at least a hundred years, this Court has recognized that a presumption against preemption applies when Congress legislates in a field traditionally occupied by the States. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. __, 125 S. Ct. 1788, 1801 (2005); *New York v. FERC*, 535 U.S. 1, 17-18 (2002); *Cipollone v. Liggett Group*, 505 U.S. 504, 516, 523 (1992); *id.* at 532 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *Hillsborough County*, 471 U.S. at 715; *Savage v. Jones*, 225 U.S. 501, 537 (1912); *Reid v. Colorado*, 187 U.S. 137, 148 (1902).[12] As the Court has explained:

> In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*; *Hillsborough Cty.*, 471 U.S. at 715-716; *cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987).

Medtronic, 518 U.S. at 485 (alterations in original).

The California Supreme Court thus properly applied the presumption against preemption because, as it correctly found, protecting consumers from misleading brand names and

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[12] *See also Allen-Bradley Local No. 1111 v. Wis. Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (stating that the Court had "*long insisted* that an intention of Congress to exclude States from exerting their police power must be clearly manifested" (emphasis added; internal quotation marks omitted)).

labels on alcoholic beverages, including wine, historically has been regulated by the States through the exercise of their traditional police powers. App. 14a. *See supra* pp. 2-3.

2. *This Court Has Recognized the Presumption in Conflict-Preemption Cases.*

Petitioners wrongly assert that this Court has refused to apply the presumption against preemption in cases involving a claim of implied conflict preemption. The very opposite is the case. *See, e.g., Hillsborough County*, 471 U.S. at 716 ("Appellee must . . . present a showing of implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."). In *New York v. FERC*, this Court recently made clear that a presumption applies in conflict preemption cases: "The Court has most often stated a 'presumption against pre-emption' when a controversy concerned . . . whether a given state authority *conflicts with*, and thus has been displaced by, the existence of Federal Government authority." 535 U.S. at 17-18 (emphasis added) (quoting *Hillsborough County*, 471 U.S. at 715).[13] The decision below is fully in accord with this Court's decisions.

Petitioners' lengthy quotation from *Geier*, Pet. 16-17, reflects nothing more than the Court's refusal to require "an *express* statement of pre-emptive intent." *Geier*, 529 U.S. at

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[13] The Court in *Crosby* did not, as Petitioners claim, Pet. 18, raise any question about the general applicability of the presumption in conflict preemption cases. 530 U.S. at 374 n.8. Rather, it merely deferred the question of the presumption's application in the specific "context" of that case, which concerned international relations. *Id.* (citing *United States v. Locke*, 529 U.S. 89, 108 (2000)). In any event, the Court has since reaffirmed the applicability of the presumption in conflict-preemption cases. *See New York v. FERC*, 535 U.S. at 17-18; *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

884 (emphasis added). That refusal, however, has no bearing on whether a presumption against preemption applies and is irrelevant here, where the California Supreme Court did not require such an express statement of preemptive intent by Congress or BATF.[14] Indeed, the Court in *Geier* did not address the presumption against preemption other than to *acknowledge* its existence, stating: "While we certainly accept the dissent's basic position that a court should not find preemption too readily in the absence of clear evidence of a conflict, for the reasons set out above, we find such evidence here." *Geier*, 529 U.S. at 885 (internal citation omitted).

3. *The Federal Courts of Appeals Have Recognized the Presumption in Conflict Preemption Cases.*

The California Supreme Court's decision is also consistent with decisions of the federal Courts of Appeals, including the Fifth and Eleventh Circuits. Petitioners' attempt to demonstrate a conflict among the Circuit courts misapprehends the case law.

The Fifth Circuit applies the presumption against preemption, including in conflict preemption cases. *See Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005) (stating, in obstacle-preemption case, that court starts with presumption that state statute is valid); *Astraea Aviation Servs., Inc. v. Nations Air Inc.*, 172 F.3d 390, 395 (5th Cir. 1999) (holding the plaintiff "must overcome the presumption against preemption," where state regu-

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[14] Notably, Justice Breyer, the author of the Court's opinion in *Geier*, expressly acknowledged in a subsequent opinion that when, as here, the question is whether a State statute stands as an obstacle to congressional purposes, "we must remember that petitioner has to overcome a strong presumption *against* pre-emption." *Egelhoff*, 532 U.S. at 157 (Breyer, J., dissenting) (emphasis in original). The Court in *Egelhoff* similarly acknowledged that "[t]here is indeed a presumption against pre-emption in areas of traditional state regulation." *Id.* at 151 (majority opinion).

lation allegedly would "thwart the policy behind [the] federal regulation").[15]

Similarly, in a case raising both express and implied conflict preemption, the Eleventh Circuit recently stated: "When we consider issues that arise under the Supremacy Clause (i.e., preemption issues), we start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004);[16] *see also Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327-28, 1329 n.3 (11th Cir. 2001) (starting with "the basic assumption that Congress did not intend to displace state law" and finding that the state law did not stand as an obstacle to congressional objectives (quotation marks omitted)).

The older Eleventh Circuit decisions cited by Petitioners have been superseded by more recent decisions. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), and *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997)—on which the later decision cited by Petitioners relies, *see Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002)—are no longer good law in light of subsequent decisions. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 55 n.3 (2002); *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521-22 (11th Cir. 1994), *aff'd sub nom. Freightliner*

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[15] The Fifth Circuit did not, as Petitioners claim, "reject[] the notion that plaintiffs had to show preemptive intent," Pet. 17, in *Wells Fargo Bank v. James*, 321 F.3d 488 (5th Cir. 2003). Rather, the *Wells Fargo* court started with the premise that in assessing preemption the "paramount concern is to effectuate the intent of Congress," *id.* at 491, but held that where preemption is based on an agency regulation, the court must determine whether the agency had authority to supplant state law, *id.* at 493.

[16] Contrary to Petitioners' suggestion, Pet. 19, the *Cliff* court did not limit this principle to field preemption, as opposed to conflict preemption. 363 F.3d at 1122.

Corp. v. Myrick, 514 U.S. 280 (1995). In *Myrick*, 13 F.3d at 1521-22, the Eleventh Circuit explicitly acknowledged the applicability of the presumption against preemption: "'In the interest of avoiding unintended encroachment on the authority of the States . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress."'" *Id.* at 1524 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (alterations in original).

4. *The California Supreme Court Did Not Apply the Presumption in a Field Traditionally Occupied by the Federal Government.*

Petitioners next argue that any presumption should not apply where there has been a history of significant federal regulation. Pet. 21. After an exhaustive review of the history of both federal and State regulation, App. 15a-59a, however, the California Supreme Court unanimously concluded that there was historically "very little federal regulation," of food and beverage labeling, including alcoholic beverage labeling, *id.* at 11a, and that "the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states," *id.* at 14a.

Unable to refute the California Supreme Court's detailed analysis, Petitioners attempt to turn a footnote into a basis for certiorari. Petitioners grossly distort the court's opinion by arguing that it "require[d] proof of a substantial federal presence dating back to the 'beginning of our Republic' to avoid application of the presumption against preemption." Pet. 22. Not so. The court below merely quoted in a footnote from *United States v. Locke*, 529 U.S. 89, 99 (2000), on which Petitioners had relied and which involved a field in which the federal government's role had, in this Court's words, dated

from "the beginning of our Republic." It nowhere indicated that such a showing was necessary to defeat a presumption against preemption.

II. Bronco's First Amendment Challenge Does Not Warrant Review.

The California Court of Appeal's decision is based on the well-settled principle that false and misleading speech is not protected by the First Amendment. Bronco's brand names convey objectively false information—that the wine is made with Napa-grown grapes when, in fact, it is not—and thus are not protected by the First Amendment. This case raises no controversial, new, or even difficult issues that merit this Court's review.

A. There Is No Conflict Among the Courts: False and Misleading Commercial Speech Is Not Protected by the First Amendment.

It has long been settled that false, inaccurate, or misleading commercial speech is accorded no protection under the First Amendment. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748, 771-72 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). As this Court explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980): "The First Amendment's concern for commercial speech is based on the informational function of advertising." *Id.* at 563. No protection exists for commercial speech if it does "not accurately inform the public." *Id.* at 563. Thus, to come within the ambit of the First Amendment, commercial speech "at least must concern lawful activity and not be misleading." *Id.* at 566. "The government may ban forms of communication more likely to deceive the public than to inform it." *Id.* at 563 (internal citation omitted).

There can be no serious dispute that Bronco uses its Napa brand names to convey inaccurate information to consumers.

Even Bronco has described its Napa brand names as "geographically misdescriptive." Cal. Pet. 9.[17] Bronco argues that they are nonetheless protected speech. But the Court's post-*Central Hudson* cases discussing truthful, but "potentially misleading" speech did not alter the basic principle that inaccurate commercial speech lacks First Amendment protection and may be prohibited.[18] As the Court explained in *In re R.M.J.*, 455 U.S. 191 (1982):

> *Truthful* advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading *or when experience has proved that in fact such advertising is subject to abuse*, the States may impose appropriate restrictions.

Id. at 203 (emphases added). Bronco ignores entirely the States' right to restrict commercial speech when experience has proved it to be subject to abuse or actually misleading in practice, *id.* at 202, 203, 207—as the Legislature found to be the case with respect to Napa brand names, App. 4a, 85-86a.

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[17] "Cal Pet." refers to Petitioners' July 6, 2005 Petition for Review before the California Supreme Court.

[18] *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (holding that "[b]ecause 'disclosure of *truthful*, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information,'" such information may not be banned, but "false, deceptive, or misleading commercial speech may be banned") (emphasis added; quoting *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990)); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) ("'Commercial speech that is *not* false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.'") (alteration in original; quoting *Zauderer*, 471 U.S. at 638); *Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . ."); *In re R.M.J.*, 455 U.S. at 203 ("Misleading advertising may be prohibited entirely.").

The cases on which Bronco relies regarding speech that is merely "potentially misleading" are fundamentally different from this case because they all involved attempts to convey *accurate* information, which *is* protected by the First Amendment, unlike Bronco's false and misleading brand names.[19] The *R.M.J.* Court's discussion of "potentially misleading" speech that "may be presented in a way that is not deceptive," 455 U.S. at 203, makes clear that the Court is describing *accurate* speech that has the potential to mislead, such as "a listing of areas of practice." *Id.* Because the speech at issue in these cases was accurate, it fulfilled the informational function of the First Amendment, and thus was protected even though it had the potential to mislead.

Bronco's heavy emphasis on the "presumption favoring disclosure over concealment," Pet. 23-24, is similarly misplaced. That presumption has no role in cases where, as here, the "conceal[ed]" speech is itself false and misleading; rather, the "concealment" to be avoided is of *accurate* information. As explained by this Court:

> [D]isclosure of *truthful*, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information. Even if we assume that petitioner's [speech] may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of *accurate* factual information to the public.

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[19] *See Ibanez*, 512 U.S. at 138 (addressing "truthful" representation that an attorney was a Certified Public Accountant and a Certified Financial Planner); *Peel*, 496 U.S. at 100-101, 106 (addressing prohibition on attorney letterhead that stated the "true and verifiable" fact of certification by the National Board of Trial Advocacy); *Zauderer*, 471 U.S. at 639, 651-52 (addressing "entirely accurate" attorney advertisement regarding Dalkon Shield claims); *Bates*, 433 U.S. at 372-73, 384 (addressing "whether the State may prevent the publication in a newspaper of appellants' truthful advertisement").

Peel, 496 U.S. at 108-09 (emphasis added & internal citations omitted).

Nor is there any conflict in the Circuits or State courts. Pet. 26-27. The cases from New York and the Tenth Circuit that Bronco cites in fact reiterate the principle that false and misleading speech receives no First Amendment protection. *See Revo v. Disciplinary Bd. of the Supreme Court*, 106 F.3d 929, 932 (10th Cir. 1997); *In re von Wiegen*, 470 N.E.2d 838, 843 (N.Y. 1984). Like the cases above, they apply First Amendment protection to the dissemination of *accurate* information, and do not suggest that false or misleading speech is protected. *See Revo*, 106 F.3d at 931 n.2, 932 (addressing ban on direct mail solicitation by attorneys and finding letters at issue were not misleading); *In re von Wiegen*, 470 N.E.2d at 838 (invalidating general prohibition on direct mail solicitation by attorneys, but finding that letters at issue were misleading, could be prohibited, and "there was no need to establish that the letters actually mislead the recipients").[20]

False or misleading speech is not entitled to First Amendment protection, as Bronco suggests, simply because the speaker can simultaneously contradict it. Pet. 27. If potentially misleading speech is clarified to convey accurate and non-misleading information, then the clarified, accurate information is entitled to First Amendment protection. However, this Court has never held that disclaimers are adequate to cure false or misleading commercial speech. Here, the Court of Appeal properly found that the use of Napa brand names for non-Napa wine is not protected by the First Amendment.

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[20] *Pearson v. Shalala*, also relied on by Bronco, Pet. 26, likewise addressed the dissemination of information that was not false, but merely had the potential to mislead. 164 F.3d 650 (D.C. Cir. 1999) ("The government does not assert here that appellants' health claims convey *no* factual information, only that the factual information conveyed is misleading." (emphasis in original)).

B. The Court of Appeal Did Not Defer Too Much to the California Legislature Nor Too Little to BATF.

Bronco argues that the California Court of Appeal "wrongly deferred heavily to the California Legislature's" finding that Bronco's brand names are misleading, Pet. 27-28. In fact, the Court of Appeal did not "defer" to the Legislature's findings, but rather analyzed whether they were "supported by an adequate factual basis," App. 85a. The court found that they were. *Id.* at 85a-86a. In coming to this conclusion, the court thoroughly reviewed the Legislature's findings, the BATF regulatory history, regulations from other states, and the evidence submitted by the parties. App. 86a-92a. Bronco's characterization of the court's decision as "defer[ring] heavily" (Pet. 27) to the Legislature is simply incorrect.

Bronco's description of the decision below as "effectively disregard[ing]" (Pet. 28) the regulatory history also is wrong. The court expressly considered the regulatory history, App. 88a-90a, including the fact that "[f]ederal regulators have also found that brand names of viticultural significance are misleading when the brand name does not accurately reflect the wine's true origin," App. 88a-89a. The Court of Appeal correctly concluded that there was no "finding" that labels with grandfathered brand names were not misleading. App. 89a-90a; *see also supra* p. 9.

In any event, Bronco admits that federal regulatory findings "do not automatically 'override' the [State] Legislature's contrary determination," but fails to explain what the court should have done differently to "defer" appropriately, other than simply acquiesce in the alleged contrary determination of the regulators. Pet. 30. Nor does Bronco explain why such deference would be proper when, as it also argues, the court must exercise *de novo* review. Pet. 28. Bronco essentially argues that an agency's failure to prohibit speech accords it special status under the First Amendment. As discussed above, *supra* pp. 14-19, however, nothing in the

federal regulations prevents states "from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a. Unlike BATF, the California Legislature heard evidence on the specific issue of Napa brand names, found that Napa brand names are misleading if the wine is not made from Napa grapes, and further found that these labels pose a particular concern because of the well-known reputation of the Napa region for premium wines. Cal. Bus. & Prof. Code § 25241(a); App. 4a, 85a-86a. The misleading labeling of Napa wines is thus a classic example of "when experience has proved that in fact such advertising is subject to abuse," and California's § 25241 is an appropriate restriction. *R.M.J.*, 455 U.S. at 203. California plainly has the ability to regulate such misleading brand names, despite BATF's failure to do so, or any federal failure to regulate would hamstring the States' ability to address local concerns.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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December 23, 2005

No. 05-653

In The
Supreme Court of the United States

BRONCO WINE COMPANY and
BARREL TEN QUARTER CIRCLE, INC.,

Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY VINTNERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF FOR RESPONDENTS JERRY R. JOLLY, DIRECTOR OF THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL AND THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a California statute prohibiting wine producers from mislabeling non-Napa wine as Napa wine is impliedly preempted by federal regulations.

II. Whether a statute prohibiting as false and misleading the mislabeling of non-Napa wine as Napa wine violates the First Amendment.

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STATEMENT OF THE CASE

No one doubts that Napa County is the most famous wine-growing region in the United States and the crown jewel of California's multi-billion dollar wine industry.[1] This case represents petitioners' (collectively "Bronco") second attempt before this Court to secure a shield against regulation of their deceptive labeling of non-Napa wine as Napa wine.[2] In a unanimous opinion, the California Supreme Court rejected Bronco's claim of preemption. Chief Justice George wrote that "we find nothing in the history of the underlying federal statute or the federal regulations suggesting that . . . states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns." App. 66a. A unanimous California Court of Appeal rejected Bronco's First Amendment claim, holding that the First Amendment secures no right to label wine with a brand name falsely suggestive of a Napa County origin.[3]

Modern federal wine regulations prohibit wine producers from using brand names of viticultural significance "unless the wine meets the appellation of origin requirements for the geographic area named." 27 C.F.R.

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[1] In California, by 1860 grapes ranked as one of the "three major agricultural products of the state," along with wheat and barley. VINCENT P. CAROSSO, THE CALIFORNIA WINE INDUSTRY: A STUDY OF THE FORMATIVE YEARS (1951) p. 74.

[2] While Napa-grown grapes are the most costly in the State, Bronco's subject wines are typically made from the least expensive grapes available in all of California. App. 87a.

[3] The Court of Appeal also rejected Bronco's dormant Commerce Clause and Fifth Amendment Takings Clause arguments, but Bronco has abandoned those claims.

§ 4.39(i)(1).[4] Thus, to be entitled to use a state or county appellation of origin in a brand name, at least 75 percent of the wine must be made from grapes in the named appellation, or, if an American Viticultural Area (AVA) is named, the percentage requirement rises to 85%. 27 C.F.R. §§ 4.25a(b)(1)(iii) & 4.25a(e)(3). If these compositional requirements are not met, **the federal regulations simply prohibit the use of a brand name of viticultural significance**, no matter what disclaimers might be appended elsewhere on the labeling regarding the identity and origin of the wine. The federal agency, the Bureau of Alcohol, Tobacco & Firearms[5] (BATF), has spoken clearly regarding the rationale for this prohibition. "In the case of a geographic brand name of viticultural significance, ATF believes that such a name on a label indicates the origin of the wine, that is, the place where the grapes were grown." 51 Fed. Reg. 20,480, 20,481 (1986).

However, 27 C.F.R. § 4.39(i)(2), commonly referred to as the "grandfather clause," exempts geographic brand names first used on wine labels before July 7, 1986, from the requirement that the wine be sourced from the named appellation. The grandfather clause was enacted by BATF with scant explanation.

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[4] For American wine, an appellation of origin can be the United States, a state, a county, a combination of two or three states or counties, or a viticultural area. 27 C.F.R. § 4.25a(a)(1). A viticultural area in turn is defined as a geographical grape growing area recognized in the federal regulatory scheme. 27 C.F.R. § 4.25a(e)(1)(i).

[5] This brief will refer to the applicable federal agency as BATF, although its functions are now performed by the Alcohol and Tobacco Tax and Trade Bureau.

Bronco is selling wines made from non-Napa grapes under Napa brand names,[6] a practice that would not be tolerated under the modern federal regulatory scheme (27 C.F.R. §§ 4.25a and 4.39(i)(1)) but which escapes federal prohibition by virtue of the grandfather clause (27 C.F.R. § 4.39(i)(2)). Without question, Bronco has the capacity, and apparent intention, to flood the market with wines bearing its misleading Napa brand names. In his testimony before the California Senate, Bronco's principal, Mr. Fred Franzia, confirmed that his newly-built bottling facility (petitioner Barrel Ten Quarter Circle) would have a capacity of 44.8 million gallons of wine annually (RA 014),[7] multiples in excess of the total annual wine production of the whole of Napa County. When asked whether this increased production capacity would be used to mislead consumers into buying wine with a Napa name but made from grapes grown elsewhere, he replied: "Let me tell you what. If I could sell 18 million cases of Napa Ridge, I'd be one happy guy." RA 014. There also exist dozens of other grandfathered Napa brand names that, while now apparently quiescent, can be purchased and used at any time, whether by Bronco or others in like manner. RA 0290-0291. The risks these conditions pose to the integrity, value and stability of California's wine industry are formidable.

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[6] Bronco's grandfathered brand names are "Napa Ridge," "Napa Creek Winery," and "Rutherford Vintners." All of these grandfathered brand names, which Bronco purchased, are marketed largely as impostors on wines that are not made with Napa County grapes.

[7] Respondents' Appendix in the California Court of Appeal is designated "RA."

It became apparent to the California Legislature that this regulatory exception was operating with intolerable and pernicious effect upon Napa County, California's uniquely famous wine-growing region. By virtue of its historic and preeminent role in the wine industry, the land, grapes, wines and name of Napa have unparalleled value. In June and August of 2000, the California Legislature held open debates and took testimony from numerous witnesses, including representatives of the Napa Valley Vintners Association, the California Retailers Association, Family Wine Makers of California, wine retailers, winery owners, and Petitioners and their attorneys. RA 1-7. The Legislature received legal memoranda supporting and criticizing the proposed statute as well as numerous communications from constituents including wine producers, retailers, the Napa County Board of Supervisors, and restaurants. RA 042-059, 153-172, 182, 198, 299, 301, 308, 320, 322, 324 and 331. The Legislature made appropriate findings:

> The Legislature finds and declares that for more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the name Napa County and the viticultural area appellations of origin contained within Napa County (collectively "Napa appellations") as denoting that the wine was created with the distinctive grapes grown in Napa County.
>
> The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in

> Napa County, and that consumers are confused and deceived by these practices.
>
> The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin.

Cal. Bus. & Prof. Code § 25241(a). Thus, § 25241 was enacted, forbidding the use of a Napa name unless the wine in fact qualifies for the Napa County appellation of origin under the operative provisions of 27 C.F.R. § 4.25a. Section 25241 creates a narrowly focused requirement that wines bearing Napa brand names[8] contain real Napa wine, but it does not otherwise seek to limit the domain of the federal grandfather clause either in California or nationally. It is undisputed that Bronco can conform to both federal and state laws governing the composition of wines bearing Napa brand names. Complying with Section 25241 would not put any regulated entity in conflict with any federal requirement.

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[8] The statute applies to the name "Napa," and "[a]ny viticultural area appellation of origin ... that is located entirely within Napa County" (§ 25241(c)). For ease of reference, we shall refer to the proscribed names collectively as "Napa names" or "Napa brand names." "No wine produced, bottled, labeled, offered for sale or sold in California" shall use the prohibited names "in a brand name or otherwise, on any label, packaging material, or advertising." § 25241(b).